No. 84-782

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF SOUTH CAROLINA, *et al.*,
Petitioners,

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONERS

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INTRODUCTION

To determine whether the Catawbas hold a special status under federal law permitting them to now pursue a claim that allegedly arose 145 years ago, requires the analysis and construction of a 1959 statute, 25 U.S.C. §§ 931-938, commonly referred to as the Catawba termination act.[1] In plain language, that statute explicitly declares that the Catawbas shall be ineligible for any special federal services for Indians, that federal Indian statutes shall not apply to them, and that state law shall apply to them. It also authorized the distribution of lands formerly held communally as reservation lands to individuals in fee.[2] Both the language of the statute and its legislative history reflect an intent by Congress to put the Catawbas "on the same status as other citizens with the same responsibilities."[3]

The Catawbas nevertheless ask this Court to affirm the court of appeals majority's rewriting of the statute. They ask that an unambiguous termination act be rewritten to afford them a special federal status permitting them to commence—at any time—an action to create an Indian reservation where cities and towns now govern and 27,000 innocent landowners hold title. Their arguments in support are contrary to the plain words of the statute, lack support in the legislative history, and would

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[1] The Catawbas suggest that describing 25 U.S.C. §§ 931-938 as the Catawba termination act is somehow inappropriate. *See* Respondent's Brief at 2 n.1. However, throughout the consideration and enactment of the statute both the Catawbas and the legislators referred to the statute as a termination act. *See, e.g.*, Brief of Petitioners at 18 nn.52-54. Moreover, this Court listed the Catawba act as "one of a series of termination statutes. . . ." *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 133 n.1 (1972). Even a treatise authored in part by co-counsel for the Catawbas below and frequently cited by them in this Court, F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), declares at page 174 that, after the 83rd Congress, "[s]ubsequent Congresses terminated [*inter alia*] . . . the Catawbas of South Carolina. . . ."

[2] *See* 25 U.S.C. § 933.

[3] July 10, 1959, Hearing Transcript at 10 (lodged with the Clerk).

produce a result completely opposite to the one Congress intended.

ARGUMENT

I. THE CATAWBA TERMINATION ACT UNAMBIGUOUSLY DIRECTS THAT STATE LAW APPLY TO THE CATAWBAS.

The Catawbas repeatedly lament that petitioners "would have the Court focus only on isolated statutory language," and "would have the Court look no further than the words of Section 5 for its result." [4] The Catawbas do not even quote, much less analyze, the critical provisions of the Catawba termination act. They avoid the words of the statute and endeavor to construct an argument which dismisses as irrelevant what this Court repeatedly has declared to be the appropriate starting point for construing a statute—its language.[5]

The second sentence of Section 5, 25 U.S.C. § 935, declares, in plain English, what will happen to the "tribe and its members" upon the effective date of the act:

> [T]he tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several states shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction.

[4] Respondent's Brief at 16, 22.

[5] In a variety of contexts, including the construction of statutes involving Indians, this Court repeatedly has directed that statutory language clearly expressing congressional intent be given effect. *See Landreth Timber Co. v. Landreth*, —— U.S. ——, 105 S. Ct. 2297, 2301 (1985), *quoting Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975); *Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe*, —— U.S. ——, 105 S. Ct. 3420, 3432 (1985); *Rice v. Rehner*, 463 U.S. 713, 732 (1983); *National Broiler Marketing Assoc. v. United States*, 436 U.S. 816, 827 (1978), *quoting United States v. Sisson*, 399 U.S. 267, 297 (1970) ("[A] statute 'is not an empty vessel into which this Court is free to pour a vintage that we think better suits present day tastes' . . . . Considerations of this kind are for the Congress not the courts.").

As demonstrated in petitioners' opening brief,[6] ordinary English grammar compels the conclusion that the "tribe and its members" are the subject of the sentence, and each of the three following clauses explains what happens to "them," *i.e.*, the "tribe and its members." That sentence plainly dictates that state law apply to the Catawbas, both individually and collectively, and not special federal Indian statutes. Recognizing that Congress expressed its intent in clear and unambiguous language, the Solicitor General correctly concluded, "The fact is the Catawba Act is not equivocal." [7]

The Catawbas, nevertheless, attempt to manufacture some ambiguity. When they grudgingly discuss the words of the statute, they focus on a different sentence and assert:

> A careful reading of § 5 reveals that it is unclear whether . . . state law shall thereafter apply to both the Tribe and its members . . . and whether [special federal Indian] statutes . . . were rendered inapplicable to both the Tribe and its members or only to the individual members of the Tribe.[8]

As an illustration of the alleged ambiguity, the Catawbas point to the final sentence of Section 5: "Nothing in §§ 931-938 of this title [the Catawba termination act], however, shall affect the status of such persons as citizens of the United States." The Catawbas then assert that that sentence of Section 5 "plainly refers to individuals, its purpose being to preserve the citizenship status of individual Indians. *See* 8 U.S.C. § 1401(b)." [9]

[6] Brief of Petitioners at 32.

[7] Brief for the United States as *Amicus Curiae* in Support of the Petition for a Writ of Certiorari ("United States' Brief") at 15.

[8] Respondent's Brief at 38.

[9] Respondent's Brief at 50. The respondent's citation to 8 U.S.C. § 1401(b) is erroneous. That subsection deals with the loss of

Apart from the illogic of presuming that the third sentence of Section 5 somehow limits the sweep of the second sentence, the interplay of these provisions confirms that Section 5 was intended to (and did) terminate any status the Catawbas may have had as a tribe under federal law. 8 U.S.C. § 1401(a)(2) confers citizenship status at birth upon "a person born in the United States to a member of an Indian, Eskimo, Aleutian or other aboriginal tribe . . . ." Because the Catawba termination act ended any status the Catawbas may have had as members of a federal Indian tribe, it was necessary (or at least prudent) to include the final sentence of Section 5 to assure that the termination act would not be read to prevent them from qualifying for citizenship pursuant to 8 U.S.C. § 1401(a)(2). That the Catawba termination act—like all other termination acts—preserved the Catawbas' citizenship does not suggest that Congress intended that the full sweep of Section 5 be limited in any way.[10]

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citizenship by nationals and citizens who fail to reside within the United States for five years prior to reaching the age of 28. On the other hand, 8 U.S.C. § 1401(a)(2) governs the citizenship of persons born within the United States to members of an Indian tribe.

[10] Moreover, comparison of the Catawba termination act to the Ponca termination act, 25 U.S.C. §§ 971-980, conclusively demonstrates that protection of the citizenship of members of a terminated tribe could not have been intended to indirectly limit the scope of provisions making state law applicable and special federal Indian statutes inapplicable. Even the Catawbas are incapable of discerning a hint of ambiguity in the Ponca termination act's intent to make special federal Indian statutes inapplicable and state law applicable to *both* "the tribe and its members." *See* U.S.C. § 980. That termination act also preserves the "status of any Indian as a citizen of the United States," referring to individuals rather than the tribe. The Catawbas do not, and cannot, suggest how Congress' preservation of the citizenship of individual Indians in the Ponca termination act in any way limited Congress' intent to terminate both "the tribe and its members." Their suggestion that Congress' use of the term "such persons" in the comparable citizenship provision of the Catawba termination act limited the effect of the Catawba termination act is equally unavailing.

In a second attempt to create an ambiguity, the Catawbas compare the Catawba termination act to the 1958 California Rancheria termination act, arguing that similar language was used in those two acts and that the Rancheria and Catawba acts each made state law applicable only to individual California Indians and individual Catawbas, respectively.[13] The fundamental flaw in the Catawbas' argument is their erroneous premise that the Rancheria act "did not deal with tribal assets" and thus could not have affected a "tribe." [14] But, in fact, pursuant to the California Rancheria termination act, rancheria lands formerly held communally were distributed to individual community members.[15] Thus, contrary to the central premise of the Catawbas' argument, the Rancheria act affected collective entities and communal property as well as individual Indians.[16]

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[13] Respondent's Brief at 39-40.

[14] *Id.* at n.35.

[15] Section 1 of the Rancheria termination act states:

> That the lands, including minerals, water rights, and improvements located on the lands, and other assets of the following rancherias and reservations in the State of California shall be distributed in accordance with this Act. . . .

72 Stat. 619 (1958).

See also Taylor v. Hearne, 637 F.2d 689 (9th Cir.), *cert. denied*, 454 U.S. 851 (1981) (tax sale affirmed of former rancheria land that had been distributed to a rancheria member pursuant to the termination act); *Table Bluff Band of Indians v. Andrus*, 532 F. Supp. 255, 258, 260-61 (N.D. Cal. 1981) (describing procedure by which California Rancheria Act was to become effective as to individual rancherias).

[16] The Rancheria termination act often referred to the affected "Indians," *not* because it applied only to individuals, but because the various listed bands and rancherias would be terminated only if they later voted in a referendum to be terminated. The legislation could not anticipate which rancherias would be terminated. W.C. Sturtevant, Ed., *Handbook of North American Indians*, Vol. 8, *California* (Heizer, Ed.), "Litigation and Its Effects" at 709-12; "Social Organizations" at 673-6. *See* Section 2 of 72 Stat. 619 (1958).

The Catawbas' third basis for contending that the Catawba act is ambiguous rests on yet another erroneous reading of a different termination act. The Catawbas note that the Ponca termination act describes the federal statutes that will be inapplicable after termination as those that "affect Indians or Indian tribes." The Catawbas argue that this was done to ensure that "the Ponca Tribe, as well as its members, would be among those . . . to whom state law would apply."[17] But the relevant sentence in the Ponca act is structured in exactly the same way as the second sentence of the Catawba act, and provides that "the tribe and its members" shall not be entitled to special federal services, nor shall federal Indian statutes apply to "*them*." The last clause of the sentence is identical to the Catawba termination act, providing that "the laws of the several states shall apply to *them*"—referring to the subject of the sentence, the "tribe and its members." *Cf.* 25 U.S.C. § 935 and § 980.

Despite the Catawbas' efforts, there is no ambiguity in the Catawba termination act. State law applies to "them," individually and collectively.

II. THE CATAWBA TERMINATION ACT WAS NOT LIMITED TO REVOKING THE MEMORANDUM OF UNDERSTANDING.

The Catawbas argue that the Catawba termination act was intended only to revoke a 1943 agreement—the "Memorandum of Understanding"—between the Bureau of Indian Affairs, the Farm Security Administration, the Catawbas and the State of South Carolina.[18] However, it is inconceivable that Congress held hearings, solicited the views of the Bureau of Indian Affairs and the Catawbas, and enacted legislation bearing all the

[17] Respondent's Brief at 40.

[18] The Court of Appeals majority accepted that argument, concluding that the act was "intended only to end federal supervision and assistance arising out of the 1943 Memorandum of Understanding." Pet. App. 15a-16a.

hallmarks of termination legislation for the limited purpose of revoking an agreement which was entered into without legislation and which required no legislation to end. Furthermore, Congress did not even mention the Memorandum of Understanding in the statute, an extraordinary legislative oversight if its only purpose was to revoke that Memorandum. To the contrary, as the Solicitor General concluded, Congress plainly intended the Catawba act to terminate "all trust relationships between the federal government and the tribe concerned, whatever their source."[19]

That the Memorandum of Understanding was referred to by some of the witnesses at the hearings on the Catawba termination act is scarcely remarkable—it was the only existing specific arrangement for providing the Catawbas federal services. But those references do not suggest that the act was limited to revoking the Memorandum.

The Catawba termination act did far more than simply revoke the agreement between the federal administrative agencies, the Catawbas and the State of South Carolina. For example, Section 5 commands that "all statutes

[19] United States' Brief at 15. *See also* Brief of Petitioners at 36-40. The Catawbas advance no explanation why Congress would have employed the same process and the same language in the Catawba act as in the eleven other termination acts to produce a result dramatically different from the plain meaning of the words and the explicitly declared policy to end the special federal status of Indians and their tribes. Congress was pursuing the declared policy of "eliminat[ing] the reservations. . . ." *See, e.g.*, Wilkinson, *The Passage of the Termination Legislation*, in *Final Report to the American Indian Policy Review Comm'n*, in *Task Force Ten, Report on Terminated and Nonfederally Recognized Indians*, 1627 (October 1976) (U.S. Gov't Printing Office). The Chairman of the Senate Committee on Interior and Insular Affairs declared at the outset of the termination period, "If we have severed the cord which binds us to the Indians or the Indians to us, we want it completely severed, and not just a little strand left." *Joint Hearings on S. 2745 and H.R. 7320 Before the House and Senate Subcommittee of the Committees on Interior and Insular Affairs*, 83d Cong., 2d Sess. 250 (1954) (R. Vol. III, Ex. 7).

that affect Indians because of their status as Indians shall be inapplicable to them." Regardless of whether "them" refers only to individuals or to both the tribe and its members,[20] nothing in the Memorandum of Understanding purported to, or indeed constitutionally could, make special federal statutes applicable to the Catawbas.[21] This command would be superfluous unless it was intended to end any and all special relationships between the Catawbas and the United States which might cause special federal Indian statutes to apply.

The Catawbas' argument that the statute only revoked the Memorandum of Understanding renders numerous other provisions of the statute inoperative.[22] That is a result this Court has sought to avoid in construing federal Indian legislation. Indeed, "The elementary

[20] *But see* above at 2-8.

[21] *See United States v. Antelope*, 430 U.S. 641, 646 and n.7 (1977); *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

[22] Section 5 also commands that "the laws of the several States shall apply to them in the same manner they apply to other persons within their jurisdiction." Again, nothing in the 1943 Memorandum of Understanding prevented the application of state law to the Catawbas. The command that state law apply would be superfluous unless Congress intended to remove any barrier to the operation of state law arising from any source. To construe the act only to revoke the Memorandum would render this directive inoperative.

Section 5 also commands that "the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians." If Congress intended to terminate only those services rendered to the Catawbas pursuant to the Memorandum of Understanding, there was no need for the statute to remove the Catawbas' entitlement to "*any* of the special services" available to Indians, including those which would be available without regard to the existence of a Memorandum of Understanding. The Catawba act thus had the effect not only of ending services under the Memorandum but of ending the possibility of obtaining other services under other federal Indian statutes.

The provision in Section 5 protecting the Catawbas' citizenship similarly would be meaningless if the act only revoked the Memorandum, since the Memorandum had no effect on citizenship. *See also* Brief of Petitioners at 38, for still more examples.

canon of construction that a statute should be interpreted so as not to render one part inoperative" [23] was reaffirmed by this Court just last term.

III. CONGRESS DID NOT INTEND TO PRESERVE FOREVER ANY CLAIM TO RECOVER LAND FROM THOUSANDS OF INNOCENT PERSONS.

There is no provision in the Catawba termination act which affirmatively preserves any federal claim—much less a claim which would dispossess 27,000 innocent landowners—from the effects of termination. Congress had, of course, preserved federal claims in termination statutes enacted both before and after the Catawba termination act.[24]

In the district court the Catawbas explained the absence of any language preserving the claim by the candid concession, "Here, of course, there is no indication that Congress was made aware of the Catawba claims." [25] Now the Catawbas attempt to convert the absence of any language concerning the claim into an affirmative decision by Congress that the claim would not be affected by the termination act. They contend that the Catawba termination act must be construed as if it were "a contract that was drawn up by the [BIA]." [26] The Catawbas' argument must be rejected because it rewrites history as well as the statute.

[23] *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, —— U.S. ——, 105 S. Ct. 2587, 2595 (1985) *quoting Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

[24] *See, e.g.*, 25 U.S.C. § 564t and 25 U.S.C. § 677r.

Nor is there any provision in the Catawba act that preserves any Catawba property rights from the effects of termination, although Congress sometimes specifically declared in other termination acts that state law would not apply for a period of time to particular Indian property interests. *See, e.g.*, 25 U.S.C. §§ 564m(a) and (b) and 25 U.S.C. § 752.

[25] Plaintiff's Memorandum in Opposition to Motion to Dismiss at 50 (filed 6/25/81 in the district court).

[26] Respondent's Brief at 12, 24.

There is no support for the Catawbas' present assertion that any claim they mentioned in 1959 was a Nonintercourse Act claim. The only claim ever mentioned was a claim against the State of South Carolina, which was never characterized in a way that would be recognizable as a claim to recover land from innocent persons.[27] For example, Catawba Chief Blue told the BIA program officer investigating the Catawbas' readiness for termination that "the State owe[d] them for the land" and that he would "rather have 'a handout' from the State with no law suit." [28] The Chief wrote in a letter included in the hearing records on the Catawba termination act that the State of South Carolina "owes us a great deal." [29] The 1959 tribal resolution that led to the Catawba termination act requested "that nothing in this legislation sh[ould] affect the status of any claim against the State of South Carolina by the Catawba Tribe." [30]

Because the only claim that was brought to the attention of Congress or the BIA at the time of the Catawba

[27] It is apparent from the Catawbas' own brief that any claim discussed in connection with the termination act was always referred to as a claim against the State. *See* Respondent's Brief at 11 (BIA program officer discussed claim against the *State* with a Catawba), 16 (Indians asked that claim against the *State* be unaffected by proposed legislation), 24 (Catawba Chief's letter asserting that the *State* owed the Indians "a great deal"), 27 n.20 (conceding that the claim was commonly described as a claim against the *State*).

The Catawbas' recitation of pre-termination act history confirms that the nature of the claim the Catawbas thought they had against the State of South Carolina was not a Nonintercourse Act claim. The Catawbas dispute whether the State performed its obligations under the 1840 treaty. *See* Respondent's Brief at 6, 27 ("The Tribe simply understood that the State had taken its 1763 Treaty lands and had not honored its agreement to buy new tribal lands . . . .").

[28] R. Vol. VI, Plaintiff's Ex. 53 at 6-7.

[29] July 10, 1959, Hearing Transcript, unnumbered insert.

[30] J.A. at 103.

termination act was a claim against the State,[31] Congress may have viewed the declaration in Section 6, 25 U.S.C. § 936, that the Catawba termination act would not "affect the rights, privileges, or obligations of the tribe and its members under the laws of South Carolina" to be sufficient to preserve for the Catawbas the opportunity to bring a claim against the State. But Congress could not have thought that the claim under discussion was a claim against 27,000 innocent persons to recover the land the Catawbas conveyed to the State of South Carolina in 1840 and could not have intended to preserve that kind of claim.

To demonstrate how implausible it is to suggest that Congress intended to preserve from the operation of termination the Nonintercourse Act claim the Catawbas now assert, it is necessary only to examine what the contemporary understanding was in 1959 of the Catawbas' ability to assert such a claim. The Department of the Interior had specifically informed the Catawbas as early as 1909,[32] and continuously asserted until the First Circuit's 1975 decision in *Joint Tribal Council of Passa-*

[31] The Catawbas' brief frequently refers to their "1763 treaty claim" or their "reservation claim" or their "dispossession claim," as if those references appeared in the legislative history of the Catawba act. *E.g.*, Respondent's Brief at 16, 20, 22, 24. Those words were not used to describe the Catawbas' claim during consideration of the termination act, however, so it is scarcely remarkable that those words never appear in the statute.

[32] The Catawbas concede that more than 50 years before the Catawba termination act was passed they requested that the Department of Interior assist them in pursuing a Nonintercourse Act claim "but were rejected because the Catawbas were 'state Indians' for whom the Department concluded the United States had no responsibility." Respondent's Brief at 6. Indeed, the Catawbas acknowledge that as early as 1910 they were "advised by a federal Indian agent that they could not even get into court for a legal hearing on their claim." *Id.* at n.6.

maquoddy Tribe v. Morton,[33] that the Nonintercourse Act did not apply to tribes that were not federally recognized. That the court in *Passamaquoddy* held differently sixteen years *after* the Catawba termination act was passed cannot change the prevailing understanding of the scope of the Nonintercourse Act in 1959 when Congress legislated. Just last term this Court recognized that the appropriate focus for determining congressional intent is the *contemporaneous* understanding of the law, not the view of judges from a vantage point separated by decades from the events.[34]

The Catawbas also argue that the termination act should be construed as if it were a contract, regardless of congressional intent as expressed by the plain language of the statute. However, a termination statute is not a contract.[35] It is a legislative act. It is Congress' intent that must be determined, first by reviewing the language of the act, and, second, if necessary, by reviewing its legislative history.

If Congress' intent is to control, as it must, the Catawbas' argument must be rejected. The legislative purpose of the termination era was "to eliminate the reservations and to turn Indian affairs over to the states."[36] Only some form of legislative schizophrenia could explain why

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[33] *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 654-8 (D. Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975). No petition for certiorari was filed.

[34] *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, —— U.S. ——, 105 S. Ct. 2587, 2596 (1985).

[35] *See Table Bluff Band of Indians v. Andrus*, 532 F. Supp. 255, 264 (N.D. Cal. 1981), *citing Choate v. Trapp*, 224 U.S. 665, 671 (1912).

[36] *E.g.*, Wilkinson, *The Passage of the Termination Legislation*, in *Final Report To The American Indian Policy Review Comm'n.*, in *Task Force Ten, Report on Terminated and Nonfederally Recognized Indians*, 1627-49 (October 1976) (U.S. Gov't Printing Office).

Congress would enact termination legislation while simultaneously preserving a claim which might result in the *creation* of a new reservation, on which Section 5 made special federal services unavailable, special federal statutes inapplicable, state law applicable, and 3,434 acres of which were held in fee and subject to unlimited state jurisdiction and taxation. Senator Church had no difficulty discerning Congress' intent in enacting termination legislation when he declared, "An end is an end is an end."[37] And that, of course, is what the Catawbas were told when, in 1962, they again voted to accept the benefits of termination they then perceived—participation in the broader society and unrestricted individual ownership of land they were previously incapable of developing.[38]

Aided by hindsight, the Catawbas seek to undo the effects of termination and to obtain lands transferred almost a century-and-a-half ago. They seek to profit by substituting a present-day unfairness to 27,000 innocent landowners for what they claim was an unfairness in 1840. Their desires cannot alter the words of the 1959 Catawba termination act, however, or justify a judicial rewriting of the statute.

IV. THE CATAWBA TERMINATION ACT DID NOT EXTINGUISH ANY TREATY RIGHTS BY MAKING STATE LAW APPLY TO THE CATAWBAS.

The Catawbas contend that the Catawba termination act cannot affect their claim for land because that would amount to an improper abrogation of treaty rights. They rely on Justice Douglas' decision in *Menominee Tribe of*

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[37] *Hearings on S. 869 and S. 870 Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 87th Cong., 2d Sess. 18 (1961) (R. Vol. III, Ex. 9).

[38] *See* Record Vol. III, Ex. 22, J.A. 116, informing the Catawbas that the laws of United States which applied to tribes would no longer apply to them, state law would apply to them, and any special relationship with the federal government would end and the tribe would disband as a federal tribe.

Indians v. United States,[39] holding that the Menominees had a right under an 1854 treaty with the United States to hunt and fish as they had traditionally done which had not been extinguished by the Menominee termination act. That decision depended upon a unique set of facts and does not apply here.

The issue in this case, unlike *Menominee*, is the effect of the termination act on a claim that a federal statute was violated when the Catawbas transferred their interest in land, *not* the act's effect on any treaty right. The Catawbas transferred their only treaty right—the right to occupy land—in 1840. In contrast, the Menominees had never conveyed their hunting and fishing treaty rights. The issue in *Menominee* was, therefore, the effect of the termination act on treaty rights which the Menominees unquestionably held when the termination act was passed.

The Catawbas, however, attempt to invent another treaty right—a "treaty right" not to alienate their land interest.[40] They then assert that if the termination act made state law apply to their cause of action, it would extinguish a treaty right. But any treaty right the Catawbas once held was created in 1763 by a treaty with Great Britain, not the United States. That treaty reserved land for the Catawbas to occupy, but it created no "right" inhibiting them from transferring their interest. As the three dissenting court of appeals judges recognized, the 1763 treaty "contained no restrictions on alienating this property." [41]

The Catawbas suggest that a general proclamation by Great Britain in 1763 could somehow operate to bind the United States.[42] But any promises by Great Britain of

[39] *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).

[40] Respondent's Brief at 2-4, 32-5.

[41] Pet. App. at 24a n.1.

[42] Respondent's Brief at 3.

special statutory or regulatory protection could not bind the new sovereign—the United States—after Great Britain lost the American Revolution. Indeed, in recognition that British regulation no longer operated, in 1782 the Catawbas petitioned the newly-formed United States to restrict the alienation of their land. In response, the United States gave the State of South Carolina authority to determine what measures should be taken on behalf of the Catawbas.[43] That request to the new sovereign, and the delegation of authority by the new sovereign to South Carolina, both confirm that there was no lingering effect of any British regulation.[44] These events demonstrate that the Catawbas held no treaty-based right to a special status and explain why the State of South Carolina understood the Catawbas to be within its jurisdiction.

Thus, the termination act was not, as the Catawbas contend, a "backhanded extinguishment" [45] of any treaty right when it ended any special federal status the Catawbas may have held.[46] Instead, that act only made state

[43] 1 Laws of the United States 607 (1815). *See also Cherokee Nation v. Georgia*, 30 U.S. 1, 36 (1831) (Baldwin, J. concurring).

[44] In 1783, shortly after the Treaty of Paris ending the American Revolution, Congress affirmatively declared its independent sovereignty and its sole and exclusive right to manage the affairs of Indians who were "not members" of any state. Congress also set about entering new treaties with various Indian tribes, declining to simply adopt previous treaties between Indians and Great Britain. *Id.*

[45] Respondent's Brief at 42.

[46] Even if the Catawbas had held some treaty right to special status, Congress had the power to abrogate that right and the termination act sufficiently expressed Congress' intention to end any special status. This Court explained in *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 n.22 (1979) that where legislation is obviously inconsistent with a treaty right the right is abrogated. The Court rejected an argument based on the assumption that *Menominee* required Congress to specifically address a treaty right. The Court held that the rule

law, including the state statute of limitations, applicable to a claim for land.[47]

Further, *Menominee* itself turned on the construction of an additional statute, Public Law 280,[48] which the Court read *in pari materia* with the Menominee termination act.[49] Public Law 280, was made applicable to the Menominees by the same Congress which enacted the Menominee termination act,[50] and, because it specifically preserved hunting and fishing rights granted by federal treaty, Justice Douglas concluded that the particular hunting and fishing rights in issue survived the Menom-

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of construction that an intent to abrogate a treaty right is not to be lightly imputed:

> must be applied sensibly . . . . To accept the Tribe's position would be to hold that Congress could not pass a jurisdictional law . . . unless in so doing it itemized all potentially conflicting treaty rights that it wished to affect. This we decline to do.

[47] Even if this Court's decision in *County of Oneida v. Oneida Indian Nation*, —— U.S. ——, 105 S. Ct. 1245 (1985) can be read as holding that both common law and statutory claims may exist for the return of land, *Menominee* remains inapposite. The application of state procedures to either a common law or statutory claim does not extinguish any treaty right.

[48] Pub. L. No. 83-280, Act of August 15, 1953, ch. 505, 67 Stat. 588; *codified, as amended*, 18 U.S.C. § 1162 (1976), 28 U.S.C. § 1360 (1976) and 25 U.S.C. §§ 1321-1326 (1976).

[49] Lower courts have recognized that Justice Douglas' decision turned on his interpretation of Public Law 280. *E.g., Kimball v. Callahan*, 493 F.2d 564, 567-69 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974). And, at least one lower court has held *Menominee* controls only cases involving Public Law 280. *Sac & Fox Tribe v. Licklider*, 576 F.2d 145, 152-53 (8th Cir.), *cert. denied*, 439 U.S. 955 (1978).

[50] The peculiar history of Public Law 280 and the Menominee termination act may make it more reasonable to read Public Law 280 *in pari materia* with that termination act than with other termination acts. Public Law 280 as first passed conferred certain jurisdiction on Wisconsin except for the Menominees. The same Congress passed the Menominee termination act, and, only two months after passing the termination act, amended Public Law 280 to include the Menominees, at their request. *Latender v. Israel*, 584 F.2d 817 (7th Cir. 1978), *cert. denied*, 440 U.S. 985 (1979).

inee termination act. In contrast, Public Law 280 does not apply to the Catawbas because Public Law 280 jurisdiction was never assumed by the State of South Carolina.[51] Moreover, Congress passed the Catawba termination act six years after Public Law 280 and, in doing so, made no mention of Public Law 280 or its limitation on the assumption of jurisdiction. For this additional reason, neither the holding nor the reasoning of *Menominee* applies to the Catawbas.[52]

In three decisions after *Menominee*, this Court has held that terminated Indians must enforce their property rights under the same laws as other citizens,[53] declared that state criminal law applies to terminated Indians,[54] and described termination acts as "subject-[ing] reservation Indians to the full sweep of state

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[51] 67 Stat. 588, *as amended*, 18 U.S.C. § 1162.

[52] Another basis for the holding in *Menominee* was Justice Douglas' analysis of the language contained in the Menominee termination act—and in virtually all other termination acts—which provided that "all *statutes* of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe." 25 U.S.C. § 899 (emphasis supplied). Justice Douglas reasoned that the reference to statutes (and not to treaties) revealed a congressional intention to terminate *statutory* privileges, rights and restrictions. The issue in *Menominee*, however, related to hunting and fishing rights which were guaranteed by a *treaty* and which the Menominees had not conveyed, abandoned, or otherwise relinquished. These treaty rights were preserved.

In contrast, in 1840, the Catawbas voluntarily conveyed whatever interest they had acquired under the 1763 treaty. Because these voluntary conveyances were in no way prohibited by the 1763 treaty, the plaintiff's claim to the land in issue arises from the asserted violation of a federal *statute*, the Nonintercourse Act. And in *Menominee*, Justice Douglas recognized that *statutory* rights and privileges were subject to all the effects of termination.

[53] *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 149-50 (1972).

[54] *United States v. Antelope*, 430 U.S. 641, 646-47 n.7 (1977).

laws."[55] Those decisions compel the conclusion that the Catawba termination act required the Catawbas to enforce their claim subject to the same laws as other citizens.

V. STATE LAW COMPLETELY BARS THE CATAWBAS' CLAIM.

The Catawbas argue that, even if state law applies to their claim, the claim is not completely foreclosed. They suggest that South Carolina law places a burden on each defendant to prove that he has been in possession of his land for the ten years required to establish adverse possession. If a defendant has not been in possession for that length of time, the Catawbas contend that their claim is not barred as to that defendant.[56]

As previously demonstrated,[57] the Catawbas have confused the statute of limitations (which requires that a *plaintiff* have been in possession, actual or constructive, of the land he claims)[58] with the adverse possession statute (which allows a *defendant* to establish title by showing ten years of continuous possession).[59] In their most recent brief, the Catawbas have further confused the operation of the two statutes by asserting that the ten-year statute of limitations period may only be asserted by an adverse possessor who has been on the land for at least ten years.[60] Of course, such a construction would render the statute of limitations superfluous.

A closer reading of the relevant statutes reveals that: (1) a plaintiff cannot maintain an action to recover real property unless he has been in possession within ten years of commencement of the action (§ 15-3-340); (2)

[55] *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976).

[56] Respondent's Brief at 46-50.

[57] Brief of Petitioners at 26-7 and n.83.

[58] S.C. Code Ann. § 15-3-340 (Law. Coop. 1976).

[59] S.C. Code Ann. § 15-67-210 (Law. Coop. 1976).

[60] Respondent's Brief at 48.

a person who establishes "legal title"[61] to the land will be presumed to have been in possession for purposes of the statute of limitation (§15-67-210); and (3) where a plaintiff establishes "legal title," a defendant can only establish a superior title by proving ten years continuous possession (which will disprove the presumed ten years of possession of the person holding "legal title") (§ 15-67-210). A defendant must prove ten years of adverse possession only where the plaintiff has first cloaked himself in a rebuttable presumption that he can meet the requirement of possession imposed by the statute of limitations by showing "legal title". If a plaintiff has not shown "legal title," however, and cannot prove that he actually was in possession of the land within the last ten years, then the statute of limitations bars his claim. That is precisely the case at hand. The current holders of record title have the "legal title" contemplated by the South Carolina statute,[62] not the Catawbas, so the defendants are not required to rebut any presumption of possession.

[61] South Carolina treats "legal title" as record title, and distinguishes it from a claim to ownership or other such beneficial interest. *See, e.g., Parr v. Parr*, 268 S.C. 58, 231 S.E.2d 695 (1977) (where son transmitted deed to father but it remained unrecorded in a safe, "legal title remains in [the son] under the recorded deed."). *See also State v. Jeffcoat*, 279 S.C. 167, 303 S.E.2d 855, 856 (1983) (false pretenses convictions upheld where defendants "did not disclose to purchasers that they did not have legal title. . . . Other than complete lack of ownership, we know of no greater encumbrance to a land transfer than a lack of legal title."); *FCX, Inc. v. Long Meadow Farms, Inc.*, 269 S.C. 202, 237 S.E.2d 50 (1977) (judgment lien statute inapplicable to "vendee's equitable title" but would apply to "legal title.").

[62] *Haithcock v. Haithcock*, 123 S.C. 61, 69-70, 115 S.E. 727, 729-30 (1923) ("[I]f one shows paper title . . . then the law presumes that he was in possession of that land . . . ."). The Catawbas cannot produce such a paper title, although they may point to the 1763 treaty, because the most recent document relating to their interest in this land is a conveyance, the 1840 treaty. Muniments of title are held by others.

Furthermore, since the Catawbas have conceded that they have not possessed the land in issue since 1840, 140 years before they commenced this action, and have conceded that fee title was in the State of South Carolina,[63] it is indisputable that the statute of limitations bars their claim. No presumptions are relevant.[64]

CONCLUSION

For all of the reasons set forth here and in the Brief of Petitioners, as well as in the United States' Brief, the decision of the court of appeals majority should be reversed.

Respectfully submitted,

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[63] Respondent's Brief at 5-6, 19 n.14.

[64] The application of a ten-year statute of limitations is consistent with South Carolina's general policy regarding claims to recover land. For example, another South Carolina statute of limitations requires a person who has been subject to a disability that tolled the running of the statute of limitation on land claims to bring any action to recover land *within ten years* after the date the disability ends. S.C. Code Ann. § 15-3-370 (Law. Coop. 1976 and Supp. 1984). *See also* Brief of Petitioners at 23-6, 28-9.